CHAY CHONG HWA & ORS.

v.

SEAH MARY

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
LP THEAN J
A WAHAB GHOWS J
[CIVIL APPEAL NO. 86 OF 1982]
24 MAY 1984

SUCCESSION: *Sale and purchase agreement with administrators - Whether still subsisting - Order for grant of letters of administration extracted - Whether certificate under s. 37(1), Estate Duties Act sufficient - Whether transmission necessary.*

CONTRACT: *Sale and purchase agreement - Whether validly rescinded - Right of rescission under condition 5 of the (Revised) Singapore Conditions of Sale - Whether rescission justified.*

CIVIL PROCEDURE: *Proceedings initiated by originating summons - Whether appropriate.*

The first three appellants and one Lee Ee Hoong ("the deceased") were registered as proprietors as tenants in common in equal shares of a piece of land with a house thereon, in Singapore ("the property"). The fourth appellants were the administrators of the estate of the deceased. By an agreement dated 30 September 1980 ("the sale agreement"), the fourth appellants, as administrators, agreed to sell to the respondent the property. At the date of the sale agreement, the fourth appellants had not extracted the grant of letters of administration of the estate of the deceased, although an order for the grant had been made in 1975. They had, however, already obtained a certificate under s. 37(1) of the Estate Duties Act (Cap. 137). When completion of the sale agreement was to take place, the respondent refused to proceed unless the grant of letters of administration was produced. On the respondent refusing to withdraw the above requirement the fourth appellants wrote to the respondent, informing her that the sale was annulled.

The fourth appellants claimed to exercise the right to annul the sale under conditions 5 of The (Revised) Singapore Conditions of Sale, which was a term of the sale agreement. The respondent took out an originating summons, pursuant to s. 4 of the Conveyancing and Law of Property Act (Cap. 268).

Held:

[1] The matter before the Court fell squarely within the ambit of s. 4 of the Conveyancing and Law of Property Act (Cap. 268) and the originating summons initiated by the respondent was the appropriate procedure for bringing the matter before the Court.

[2] The grant of letters of administration of the deceased was required to be produced for the purpose of completing the sale of the deceased's undivided one quarter share of the property. Neither s. 37(2) of the Probate and Administration Act (Cap. 23) nor s. 47(2) of the Land Titles Act (Cap. 276) were applicable. To be able to complete the sale the fourth appellants must first apply to have the undivided share transmitted to themselves as registered proprietors under s. 92(1) of the Land Titles Act. (*M.T.A. Mootiah Chitty v. Ong Hai Swee & Anor.* [1911] 12 SSLR 84).

[3] The annulment of the sale was invalid. They had not validly exercised the right of rescission of the sale agreement under condition 5 of the (Revised) Singapore Conditions of Sale. They were not justified in invoking condition 5. Though the fourth appellants had not behaved recklessly in entering the sale agreement at a time they had not extracted the grant of letters of administration, the mistake made by them that a certificate under s. 37(1) of the Estate Duties Act was sufficient being a genuine mistake, they had in the circumstances of the case, acted unreasonably in invoking condition 5. [*Duddell v. Simpson* [1866] Ch. App. 102; *In re Jackson and Haden's Contract* [1906] 1 Ch. 412; *Selkirk v. Romar Investments Ltd.* [1963] 3 All ER 994).

[Appeal dismissed.]

Cases referred to:
M.T.A. Mootiah Chitty v. Ong Hai Swee & Anor. [1911] 12 SSLR 84
Duddell v. Simpson [1866] Ch App 102
Selkirk v. Romar Investments Ltd [1963] 3 All ER 994

Legislation referred to:
Conveyancing and Law of Property Act [Sing], s. 4.
Estate Duties Act (Cap 137) [Sing], s. 37(1).
Land Titles Act (Cap 276) [Sing], ss. 47(2), 92(1).
Probate and Administration Act (Cap 23) [Sing], s. 37(1), (2).

JUDGMENT

Wee Chong Jin CJ, LP Thean J, A Wahab Ghows J:

The first, second and third appellants and one Lee Ee Hoong, deceased are registered as proprietors as tenants in common in equal shares of the land, Lot 960 of Mukim V, Pandan, together with a house thereon known as 12, Sunset Square, Singapore ("the property"). The fourth appellants are the administrators of the estate of Lee Ee Hoong deceased ("the Deceased") who died on 16 March 1975. By an agreement dated 30 September 1980 ("the Sale Agreement") the appellants agreed to sell to the respondent the property at the price of $420,000 and in such sale the fourth appellants are selling the interest of the Deceased in the property as administrators. As at the date of Sale Agreement the fourth appellants had not extracted the grant of letters of administration of the estate of the Deceased, though an order for the grant was made on 10 October 1975 by the Assistant Registrar of the High Court. In fact, the grant was extracted only on 5 May 1981.

Under cl. 4 of the Sale Agreement the appellants were to obtain a certificate from the Commissioner of Estate Duties releasing the property from any claim for estate duty payable thereon in respect of the death of the Deceased and under cl. 9 thereof completion of the sale and purchase of the property was to take place within 14 days after the respondent had received notice of such certificate. On the date when the Sale Agreement was executed, i.e., 30 September 1980, the fourth appellants had already obtained the certificate dated 4 September 1980 from the Commissioner under s. 37(1) of the Estate Duties Act (Cap. 137), and immediately after the Sale Agreement was executed the appellants gave notice thereof to the respondent. When completion of the sale and purchase of the property was to take place, the solicitors acting for the respondent requested for production of the grant of letters of administration of the estate of the Deceased. The solicitors acting for the appellants, on the other hand, took the view that it was not necessary to produce such a grant; the only proof that need to be produced to the Registrar of Titles for the purpose of registering the transfer of the property was the order made for the grant, and this proof could be given in

the form of a certified copy of the petition for the grant with the said order endorsed thereon. The said order in this case was given in the form of the words, "Be it so" appearing at the bottom of the petition signed by the Assistant Registrar of the High Court. As it transpired, no agreement on this point was reached between the respective solicitors, and on 21 January 1981 the solicitors for the appellants invoked condition 5 of The (Revised) Singapore Conditions of Sale (which is a term of the Sale Agreement) and gave 10 days' notice in writing to the solicitors for the respondent to the effect that if on the expiry of 10 days from the date of the notice the respondent did not withdraw her requirement for production of the grant of letters of administration of the estate of the Deceased, then pursuant to that condition the sale would be annulled. The solicitors for the respondent did not withdraw the requirement, and on 4 February 1981 the solicitors for the appellants wrote a further letter to the solicitors for the respondent stating that as the requirement for production of the grant had not been withdrawn, the sale was annulled.

The respondent then on 13 March 1984 took out an originating summons, entered as No. 128 of 1981, pursuant to s. 4 of the Conveyancing and Law of Property Act (Cap. 268) applying for, *inter alia*, the following reliefs, namely:

(a) a declaration that the fourth appellants are not entitled to call upon the respondent to complete the purchase of the property without the production of the grant of letters of administration of the estate of the Deceased.

(b) a declaration that the notice dated 21 January 1981 given to the respondent pursuant to condition 5 of The (Revised) Singapore Conditions of Sale is invalid, and

(c) a declaration that the Sale Agreement is still subsisting and binding on the parties thereto.

The summons was heard by Lai Kew Chai J who held that the production of the grant of letters of administration of the estate of the Deceased was required for completing the sale of the property, and made an order in terms of the summons. Against that decision the appellants appealed. At the conclusion of the appeal we dismissed it with costs to the respondent.

Before us several points were raised and argued by Miss Kao for the appellants, including a point of procedure that the matter should not have been brought before the Court by way of an originating summons under s. 4 of the Conveyancing and Law of Property Act (Cap. 268) but by a writ of summons, on the ground that there were facts in dispute. We have no doubt in our minds that the matter before us falls squarely within the ambit of the said s. 4 and the originating summons initiated by the respondent is the appropriate procedure for bringing the matter before the Court. From the affidavits filed in support and in opposition thereof there does not appear any dispute on the facts relevant to the points in issue. Essentially this appeal revolves on only two issues:

(a) First, as the fourth appellants are selling the undivided one quarter share of the Deceased in the property as personal representatives, whether the grant of letters of administration of the estate of the Deceased is required to be produced for the purpose of completing the sale, and

(b) Secondly, if the answer to the above is in the affirmative, whether the appellants were justified in invoking condition 5 of The (Revised) Singapore Conditions of Sale.

The first issue was resolved as long ago as 1910 by the decision of the Court of Appeal in *M.T.A. Mootiah Chitty v. Ong Hai Swee & Anor.* [1911] 12 SSLR 84. In that case the owner of certain leasehold premises agreed to sell them to one Tan Kah Kee who then entered into a contract to sell them to a purchaser who in turn entered into a further contract to sell the same to a sub-purchaser. Before completion of the sale of the premises to Tan Kah Kee the owner died. Prior to his death the owner had made a will, and his executors applied to Court for a grant of probate. The Court made an order for the grant of probate but the grant was not extracted until much later. In the meanwhile, the sub-purchaser required completion of the sale of the premises to him by the purchaser. On the date fixed for completion the purchaser tendered an assignment executed by the executors of the will of the owner, by Tan Kah Kee and by him together with a certified true copy of the executors' petition for a grant of probate with the order for the grant in terms of the prayer, i.e. the words "be it so" endorsed thereon and also an office copy of the testator's will. The sub-purchaser refused to accept such documents on the ground that no evidence was disclosed of the executors' title to assign and of their power to give a complete discharge for the payment of the purchase money. It was held by the Court of Appeal that the sub-purchaser was entitled to refuse to accept such title from the purchaser. Thornton J in the Court of Appeal at p. 92 said:

> *Pinney v. Pinney*, 8 B & C 335, already referred to and all the cases that were referred to on behalf of the appellant all go to show that a grant of Probate under the seal of the Court must first be made before an executor is able to give a complete indemnity to a purchaser for the purchase money. Mr. Emerson has not been able to point a single case which supports the view he pressed on the Court; he has referred to certain passages in Williams and Ingpen which seem to suggest that some other evidence than the Probate may be accepted, but it is not at all clear that those passages refer to anything else than to those cases where an exemplification or office copy or other evidence of the fact of Probate having issued has been accepted by the Court in lieu of the Probate itself.

Admittedly, as was pointed out in that case, there is a difference of practice which exists here and in England in the manner in which a grant of probate is obtained. In England the proof that the revenue authorities have been satisfied is a preliminary step to the proof of the will and in Singapore the reverse process occurs. Such difference however, does not affect the position. Thornton J at p. 93 said:

> This difference in the practice of granting Probate it seems to me does not affect the present question. The authorities and long established practice of conveyancers in England which entitle a purchaser to demand production of a Probate by the vendor apply with equal force in this Colony. If default is made by the vendor in the production of such a Probate at or before completion when time, as here, has been made of the essence of the contract, a material proof of one of the links in the title is missing, and the purchaser in my opinion is justified in refusing to complete.

Miss Kao relied on s. 37 of the Probate and Administration Act (Cap. 23), which section was introduced by the Probate and Administration (Amendment) Act 1965, and contended that by virtue of sub-section (2) thereof, the production of a grant of letters of administration should not be necessary. We are unable to accept such an argument. Sub-section (1) of the said s. 37 provides that where a person dies intestate his movable and immovable property shall vest in the Chief Justice and under sub-section (2) thereof on the making of an order for a grant of administration by the Court all such property shall vest in the administrator. Plainly this section concerns only with the vesting of property, movable and immovable, of a person dying intestate so as to avoid a situation where the property of the deceased is not vested in anyone. The mere vesting of such property by operation of law does not

authorise an administrator to deal with the same. He must proceed to extract the grant of letters of administration and only upon such grant being extracted is he clothed with the authority and power to deal with the property of the deceased. Under s. 2 of the Probate and Administration Act letters of administration means a grant under the seal of the Court issuing the same authorising the person or persons named therein to administer an intestate's estate in accordance with the law.

In our opinion, without extracting the grant of letters of administration of the estate of the Deceased, the fourth appellants are unable to complete the sale of the Deceased's undivided one quarter share of the property. At the time of the sale the said share was still registered in the name of the Deceased, and to enable them to complete the fourth appellants must first apply to have the said share transmitted to themselves as registered proprietors under s. 92 (1) of the Land Titles Act (Cap. 276). This sub-section provides:

> (1) Personal representatives or any other persons claiming land of a deceased proprietor may apply in the prescribed form to become registered as proprietors by transmission of the land, and upon proof of their representation or claim the Registrar shall enter on the folio of the land register, or on the instrument of mortgage, charge, or lease, as the case may be, a memorial of registration as provided by s. 24.

The prescribed from referred to in this sub-section is Form 26, as provided under the Land Titles Rules, 1979, and in making an application for transmission in that Form the fourth appellants will be required to lodge together with that Form an office copy of the grant of letters of administration of the estate of the Deceased. Upon or after transmission of the said undivided one quarter share, the fourth appellants may proceed to transfer the same pursuant to the Sale Agreement and the instrument of transfer will then be expressed to be executed by them as registered proprietors, though in fact they are executing the same as personal representatives of the Deceased. It appears from the Record of Appeal that the transfer was expressed to be executed by them as personal representatives of the Deceased. Miss Kao appears to have taken the view that it is not necessary to have the undivided one quarter share of the Deceased transmitted to the fourth appellants and on the basis of s. 47(2) of the Land Titles Act the fourth appellants can execute and deliver the transfer as a personal representative of the Deceased. (See the letters dated 13 November and 1 December 1980 from her to the solicitors for the Respondent). This, with respect, is not correct. It seems to us that only in the instances enumerated in para. (a) of s. 93 of the Land Titles Act may a transfer executed by a personal representative, *qua* a personal representative, be accepted for registration without the need of a transmission application; in all other cases a personal representative must first apply for a transmission before he can execute and deliver a transfer of any interest in the land belonging to the deceased. Section 47(2) of the Land Titles Act is of no assistance on this point. That sub-section sets out a series of exceptions to the general rule under sub-section (1) of s. 47 which requires an instrument to be executed by a registered proprietor. In no way does s. 47(2) vest in a personal representative any authority to execute an instrument which he does not otherwise possess.

We now turn to the second issue in this appeal: whether the appellants have validly exercised the right of rescission of the Sale Agreement under condition 5 of The (Revised) Singapore Conditions of Sale. This condition is a very common one and is frequently found in agreements for sale and purchase of immovable property in Singapore. It is also reproduced verbatim as condition 5 of The Singapore Law Society's Conditions of Sale which are now normally adopted by legal practitioners in Singapore. The terms of this condition ("condition 5") are as follows:

> 5. If the purchaser shall make and insist on any objection or requisition either as to title, Conveyance or any matter appearing on the Particulars, Sale Plans, Conditions or otherwise, which the Vendor shall be unable, or on the ground of difficulty, delay or expense or on any other reasonable ground, be unwilling to remove or comply with, the Vendor shall, notwithstanding any previous negotiation or litigation, be at liberty, on giving to the Purchaser or his Solicitor not less than ten days' notice in writing to annual the sale, in which case (unless the objection or requisition shall have been in the meantime withdrawn) the sale shall at the expiration of the notice be annulled, the Purchaser being in that event entitled to a return of the deposit but without interest, costs or compensation.

It is obviously a condition for the benefit of a vendor giving him a right in certain circumstances to rescind the contract which has been validly made. Such a condition is undoubtedly of a very drastic nature, and understandably the Courts in exercise of their equitable jurisdiction have evolved certain principles qualifying such right of the vendor. In *Duddell v. Simpson* [1866] Ch App 102, a vendor entitled to an underlease for a term of twenty-four years, less three days, sold his property as held under a lease for a term of twenty-four years relying on the promises of persons entitled to the three days to concur and join in the sale, which such persons ultimately refused. The purchaser, however, insisted on such concurrence and as it was not possible to comply with such requirement the vendor relying on a condition of sale of the kind as condition 5 annulled the contract. Turner LJ in giving judgment for the vendor said at p. 107:

> I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must show some reasonable ground for unwillingness; thus, for instance, he may shew that if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expense which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract. But to say that a vendor, upon a condition of that description, could annul a contract *brevi manu*, without attempting to answer any of the requisitions which are made on the part of the purchaser would be opposed both to principle and authority; for that would, in truth, be giving to the vendor the power of saying that which was intended as a sale, and was a sale, shall, in truth, be no sale at all.

These principles were approved in the case of *In re Jackson and Haden's Contract* [1906] 1 Ch. 412 where the Court of Appeal held that the vendor in the circumstances of that case was not entitled to avail himself of a similar condition to annul the contract. Collins MR at p. 419 said:

> Now, it is to be noted that, in dealing with this right to rescind, the learned Judges have always criticized most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is in the circumstances of the particular case, a condition that ought to be applied for the benefit of the person who has introduced it.

Further on p. 422 he said:

> As I have already said, numerous cases have been most carefully set before us, which I have had the opportunity of examining as they were read, and it seems to me that, in every case where the vendor was allowed to avail himself of a stipulation like this, there was always absent that element of shortcoming on his part which, though falling short of fraud or dishonesty, might be described as "recklessness". The distinction is well put in the two cases that I have just read; but in none of the cases in which the vendor was allowed to avail himself of that condition was there anything which could be really imputed to the vendor as at all in the nature even of recklessness, much less of fraud or dishonesty.

Selkirk v. Romar Investments Ltd [1963] 3 All ER 994 is another case where a condition of sale similar to condition 5 was invoked by the vendor to rescind the contract and the Judicial Committee of the Privy Council there held that in the circumstances of that case the exercise by the vendor of his right of rescissions was not arbitrary or capricious or unreasonable. At p. 999 Viscount Radcliffe said:

> Now, on what can the appellant rest his claim to set aside the respondent's notice of rescission? It is plain enough that, so far as the terms of the contract go, the respondent is within its rights. Clause 3(3) is as much a part of the various undertakings and stipulations that make up the total nexus of the parties' agreement as any other of its clauses, and it is in fact a stipulation that was included in the draft put forward by the purchaser. If a vendor, having stipulated for or been conceded such a right, is to be precluded from asserting it in any particular context, it must be by virtue of some equitable principle which ensures for the protection of the purchaser; and it is not in dispute that Courts of equity have on numerous occasions intervened to restrain or control the exercise of such a right of rescission in contracts for the sale of land, despite what, on the face of the contract, its terms seem to secure for the vendor.
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> It does not appear to their lordships, any more than it did to the learned judge who tried the action, that there is any room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges, and although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can be act in bad faith. He may not use the power of rescission to get out of a sale "*brevi manu*", since by so doing he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of recklessness" in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission (see *Re Jackson and Haden's Contract* [1906] 1 Ch. 412*; Baines v. Tweddle* [1959] Ch. 679).

From these authorities it is clear that in a contract of sale and purchase of property a condition such as condition 5 does not confer on the vendor a wide and unfettered right to annul the contract. In determining whether a vendor can avail himself of such a condition the Court will look at closely the conduct of the parties to the contract. In particular, in relation to the matter objected to or required by the purchaser to be complied with, the vendor must not have been guilty of "recklessness" in entering into the contract, and unwillingness on the part of the vendor to meet the objection or comply with the requirement raised by the purchaser must not in the circumstances be unreasonable. A vendor cannot in reliance on such condition arbitrarily, capriciously or unreasonably rescind the contract, and certainly he cannot do so acting in bad faith.

With these principles in mind we now consider whether in this case the appellants were justified in invoking condition 5. On this point two aspects need to be examined: first, whether the appellants had behaved recklessly is entering into the Sale Agreement when at that time the fourth appellants had not extracted the grant of letters of administration of the estate of the Deceased, and secondly whether their unwillingness to produce the grant of letters of administration was reasonable in the circumstances. In so far as we can glean from the Sale

Agreement and the correspondence in exchange between the solicitors for the appellants and the solicitors for the respondent, the appellants and in particular the fourth appellants in entering into the Sale Agreement were acting under a mistaken impression of the law relating to the requirement of the grant .of letters of administration of the estate of the Deceased. At the time when the Sale Agreement was signed, i.e., 30 September 1980, the fourth appellants had already obtained a certificate from the Commissioner of Estate Duties under a s. 37(1) of the Estate Duties Act in relation to the undivided one quarter share of the Deceased in the property. Armed with that certificate and relying on s. 37(2) of the Probate and Administration Act and s. 47(2) of the Land Titles Act the appellants were of the view that they could validly and effectually transfer the whole of the property to the respondent. Presumably this is the reason for the existence of cl. 4 in the Sale Agreement and for completion to take place within fourteen days after such certificate was obtained. This was also evident form the letters of 24 October 13 November and 1 December 1980 written by the solicitors for the appellants to the solicitors of the respondent and in particular in the first of the three letters the solicitors for the appellants said in para. 3:

> Further you are aware that if the Grant of Letters of Administration had been extracted there would have been no necessity for us to obtain the Certificate under s. 37(1) of the Estate Duty Act.

It is of course true that if the grant of letters of administration had been obtained at that time there would be no necessity for obtaining the certificate. However, whatever might have been the reason for obtaining such a certificate, it does not follow that with such a certificate the issue of the grant can be dispensed with. The only effect such a certificate has is to release the one quarter undivided share of the Deceased in the property from any claim for estate duty payable on the death of the Deceased. Clearly, on this point the appellants erred. But is seems to us that there was a genuine mistake and on that basis it cannot be said that they were guilty of any recklessness in entering into the Sale Agreement.

We now turn to consider whether the appellants in the circumstances acted reasonably in refusing to produce the grant of letters of administration of the estate of the Deceased. They have consistently maintained that they were not required to produce the grant and that production by them of a certified copy of the petition by the fourth appellants for letters of administration of the estate of the Deceased was sufficient. However, they have not shown any reason why such grant was not obtained or could not be obtained at the time for completion of the sale and purchase of the property or shortly thereafter; what steps, if any had been taken to extract it or what delay and expenses would be entailed in obtaining it. Nor had they explained why they were unable or unwilling to extract the grant. No attempt was shown to have been made to extract the grant when confronted with a request by the Respondent to produce it. They took a very defensive position and were not prepared to re-examine the question whether in law the grant should be produced. They assumed a lofty and inflexible posture that they did not have to produce the grant and on that basis they proceeded to exercise the right under condition 5 to rescind the Sale Agreement. In these circumstances the conclusion that the appellants acted unreasonably in invoking condition 5 is irresistible, and we are of the opinion that they were not entitled to exercise their right of rescission of the Sale Agreement under condition 5. The annulment was therefore invalid and had no effect whatsoever.

Also found at [1984] 2 CLJ 193